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10

11
                    UNITED STATES DISTRICT COURT
12
                  NORTHERN DISTRICT OF CALIFORNIA
13
                        SAN JOSE DIVISION
14

15 TWIN PEAKS SOFTWARE INC.   Case No. 5:12-cv-00911-RMW

16   Plaintiff,   **PLAINTIFF TWIN PEAKS SOFTWARE
                                        INC.'S ANSWER TO DEFENDANTS RED
17 v.   HAT, INC. AND GLUSTER, INC.'S FIRST
                                        AMENDED ANSWER AND
18 RED HAT, INC. AND GLUSTER, INC.,   COUNTERCLAIMS TO PLAINTIFF TWIN
                                        PEAKS SOFTWARE INC.'S FIRST
19   Defendants.   AMENDED COMPLAINT FOR PATENT
                                        INFRINGEMENT**
20

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                                        DEMAND FOR JURY TRIAL
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PLAINTIFF'S ANSWER TO DEFENDANTS'
FIRST AMENDED ANSWER AND   CASE NO: 5:12-CV-00911-RMW
COUNTERCLAIMS TO AMENDED COMPLAINT

1   Plaintiff, Twin Peaks Software Inc. ("Twin Peaks") responds to the counterclaims of

2   Defendants Red Hat, Inc. and Gluster, Inc. (collectively, "Defendants") asserted in Defendants'

3   First Amended Answer and Counterclaims to Plaintiff Twin Peaks Software Inc.'s First

4   Amended Complaint for Patent Infringement (Dkt. No. 33) as follows:

5   **DEFENDANTS' COUNTERCLAIMS AGAINST PLAINTIFF TWIN PEAKS**

6   **Nature of Action**

7   25.   Twin Peaks admits Paragraph 25 of the Counterclaims.

8   **Parties**

9   26.   Twin Peaks admits Paragraph 26 of the Counterclaims.

10   27.   Twin Peaks admits Paragraph 27 of the Counterclaims.

11   28.   Twin Peaks admits Paragraph 28 of the Counterclaims.

12   **Jurisdiction and Venue**

13   29.   Twin Peaks admits Paragraph 29 of the Counterclaims.

14   30.   Twin Peaks admits Paragraph 30 of the Counterclaims.

15   31.   Twin Peaks admits Paragraph 31 of the Counterclaims.

16   **Free and Open Source Software**

17   32.   Twin Peaks denies Paragraph 32 of the Counterclaims to the extent that "free

18   and open source software ('FOSS')" is a term that can have different meanings in different

19   contexts. The description in Paragraph 32 of the Counterclaims regarding "FOSS" therefore

20   may not be completely accurate in all situations. Twin Peaks otherwise admits the remaining

21   allegations in Paragraph 32 of the Counterclaims.

22   33.   Twin Peaks admits that in *Jacobsen v. Katzer*, 535 F.3d 1373, 1378 (Fed. Cir.

23   2008), the Federal Circuit noted that "[o]pen source licensing has become a widely used

24   method of creative collaboration that serves to advance the arts and sciences in a manner and at

25   a pace that few could have imagined just a few decades ago." Twin Peaks also admits that the

26   Federal Circuit in *Jacobsen* stated: "Open Source software projects invite computer

27   programmers from around the world to view software code and make changes and

28   improvements to it. Through such collaboration, software programs can often be written and

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1   debugged faster and at lower cost than if the copyright holder were required to do all of the

2   work independently. In exchange and in consideration for this collaborative work, the

3   copyright holder permits users to copy, modify and distribute the software code subject to

4   conditions that serve to protect downstream users and to keep the code accessible." *Id.* at 1378-

5   79. Twin Peaks denies the remaining allegations in Paragraph 33 of the Counterclaims.

6   **Red Hat and FOSS**

7   34.   Twin Peaks lacks sufficient information to admit or deny the allegations in

8   Paragraph 34 of the Counterclaims, and therefore denies them.

9   35.   Twin Peaks lacks sufficient information to admit or deny the allegations in

10 Paragraph 35 of the Counterclaims, and therefore denies them.

11   36.   Twin Peaks lacks sufficient information to admit or deny the allegations in

12 Paragraph 36 of the Counterclaims, and therefore denies them.

13   **The GNU General Public License**

14   37.   Twin Peaks admits that Exhibit A to Red Hat's Counterclaims appears to be a

15 copy of version 2 of the GNU General Public License (the "GPLv2"). Twin Peaks lacks

16 sufficient information to admit or deny the remaining allegations in Paragraph 37 of the

17 Counterclaims, and therefore denies them.

18   38.   Twin Peaks admits that in *Wallace v. Int'l Bus. Machines Corp.*, 467 F.3d 1104,

19 1105 (7th Cir. 2006), Judge Easterbrook stated: "Copyright law, usually the basis of limiting

20 reproduction in order to collect a fee, ensures that open-source software remains free: any

21 attempt to sell a derivative work will violate the copyright laws, even if the improver has not

22 accepted the GPL." Twin Peaks lacks sufficient information to admit or deny the remaining

23 allegations in Paragraph 38 of the Counterclaims, and therefore denies them.

24   39.   Twin Peaks admits that Section 2(b) of Exhibit A to Red Hat's Counterclaims

25 states: "You must cause any work that you distribute or publish, that in whole or in part

26 contains or is derived from the Program or any part thereof, to be licensed as a whole at no

27 charge to all third parties under the terms of this License." Twin Peaks lacks sufficient

28 information to admit or deny the remaining allegations in Paragraph 39 of the Counterclaims,

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1   and therefore denies them.

2   40.   Twin Peaks lacks sufficient information to admit or deny the allegations in

3   Paragraph 40 of the Counterclaims, and therefore denies them.

4   41.   Twin Peaks admits that Section 3 of Exhibit A to Red Hat's Counterclaims

5   states:

6
    You may copy and distribute the Program (or a work based on it, under Section 2)
7   in object code or executable form under the terms of Sections 1 and 2 above
    provided that you also do one of the following:
8
    a) Accompany it with the complete corresponding machine-readable source code,
9   which must be distributed under the terms of Sections 1 and 2 above on a medium
    customarily used for software interchange; or,
10

11   b) Accompany it with a written offer, valid for at least three years, to give any
      third party, for a charge no more than your cost of physically performing source
12   distribution, a complete machine-readable copy of the corresponding source code,
      to be distributed under the terms of Sections 1 and 2 above on a medium
13   customarily used for software interchange . . . .

14 Twin Peaks lacks sufficient information to admit or deny the remaining allegations in

15 Paragraph 41 of the Counterclaims, and therefore denies them.

16   42.   Twin Peaks admits that Section 4 of Exhibit A to Red Hat's Counterclaims

17 states:

18
    You may not copy, modify, sublicense, or distribute the Program except as
19 expressly provided under this License. Any attempt otherwise to copy, modify,
    sublicense or distribute the Program is void, and will automatically terminate your
20 rights under this License.

21 Twin Peaks lacks sufficient information to admit or deny the remaining allegations in

22 Paragraph 42 of the Counterclaims, and therefore denies them.

23   43.   Twin Peaks lacks sufficient information to admit or deny the allegations in

24 Paragraph 43 of the Counterclaims, and therefore denies them.

25   **util-linux and the "mount" Program**

26   44.   Twin Peaks admits Paragraph 44 of the Counterclaims.

27   45.   Twin Peaks lacks sufficient information to admit or deny the allegations in

28 Paragraph 45 of the Counterclaims, and therefore denies them.

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1   46.   Twin Peaks lacks sufficient information to admit or deny the allegations in

2   Paragraph 46 of the Counterclaims, and therefore denies them.

3   47.   Twin Peaks lacks sufficient information to admit or deny the allegations in

4   Paragraph 47 of the Counterclaims, and therefore denies them.

5   **Red Hat's Copyright Registrations**

6   48.   Twin Peaks admits that Exhibit B to Red Hat's Counterclaims appears to contain

7   copies of U.S. Copyright Registration No. TX 7-557-456, dated August 13, 2012, for a work

8   entitled "Mount – 2.10m," and U.S. Copyright Registration No. TX 7-557-458, dated August

9   13, 2012, for a work entitled "Mount – 2.12a." Twin Peaks lacks sufficient information to

10   admit or deny the remaining allegations in Paragraph 48 of the Counterclaims, and therefore

11   denies them.

12   **Twin Peaks' Improper Use of Red Hat's Source Code**

13   49.   Twin Peaks admits Paragraph 49 of the Counterclaims.

14   50.   Twin Peaks admits Paragraph 50 of the Counterclaims.

15   51.   Twin Peaks admits Paragraph 51 of the Counterclaims.

16   52.   Twin Peaks denies the allegations in Paragraph 52 of the Counterclaims.

17   53.   Twin Peaks admits that "TPS Replication Plus" and "TPS My Mirror" include a

18   module called "mount.mfs." Twin Peaks denies the remaining allegations in Paragraph 53 of

19   the Counterclaims.

20   54.   Twin Peaks denies the allegations in Paragraph 54 of the Counterclaims.

21   55.   Twin Peaks denies the allegations in Paragraph 55 of the Counterclaims.

22   56.   Twin Peaks denies the allegations in Paragraph 56 of the Counterclaims.

23   57.   Twin Peaks lacks sufficient information to admit or deny the allegations in

24   Paragraph 57 of the Counterclaims, and therefore denies them.

25   58.   Twin Peaks denies the allegations in Paragraph 58 of the Counterclaims.

26   **COUNT 1**

27   **(Declaratory Judgment of Non-Infringement)**

28   59.   Twin Peaks incorporates by reference its responses to Paragraphs 26-31 of the

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1   Counterclaims as if fully set forth herein.

2   60.   Twin Peaks admits Paragraph 60 of the Counterclaims.

3   61.   Twin Peaks admits that Red Hat requests, pursuant to the Federal Declaratory

4   Judgment Act, 28 U.S.C. § 2201 *et seq.*, a declaration of the Court that Red Hat has not

5   infringed and does not currently infringe any claim of the '439 Patent, either directly,

6   contributorily, or by inducement. Twin Peaks denies the remaining allegations in Paragraph 61

7   of the Counterclaims.

8   62.   Twin Peaks denies the allegations in Paragraph 62 of the Counterclaims.

9   **COUNT II**

10   **(Declaratory Judgment of Invalidity)**

11   63.   Twin Peaks incorporates by reference its responses to Paragraphs 26-31 of the

12   Counterclaims as if fully set forth herein.

13   64.   Twin Peaks admits Paragraph 64 of the Counterclaims.

14   65.   Twin Peaks admits that Red Hat requests, pursuant to the Federal Declaratory

15   Judgment Act, 28 U.S.C. § 2201 *et seq.*, a declaration of the Court that the '439 Patent is

16   invalid. Twin Peaks denies the remaining allegations in Paragraph 65 of the Counterclaims.

17   66.   Twin Peaks denies the allegations in Paragraph 66 of the Counterclaims.

18   **COUNT III**

19   **(Copyright Infringement)**

20   67.   Twin Peaks incorporates by reference its responses to Paragraphs 26-58 of the

21   Counterclaims as if fully set forth herein.

22   68.   Twin Peaks lacks sufficient information to admit or deny the allegations in

23   Paragraph 68 of the Counterclaims, and therefore denies them.

24   69.   Twin Peaks lacks sufficient information to admit or deny the allegations in

25   Paragraph 69 of the Counterclaims, and therefore denies them.

26   70.   Twin Peaks denies the allegations in Paragraph 70 of the Counterclaims.

27   71.   Twin Peaks denies the allegations in Paragraph 71 of the Counterclaims.

28   72.   Twin Peaks denies the allegations in Paragraph 72 of the Counterclaims.

1   73.   Twin Peaks denies the allegations in Paragraph 73 of the Counterclaims.

2   74.   Twin Peaks denies the allegations in Paragraph 74 of the Counterclaims.

3   75.   Twin Peaks denies the allegations in Paragraph 75 of the Counterclaims.

4   **TWIN PEAKS' AFFIRMATIVE DEFENSES TO RED HAT'S COUNTERCLAIMS**

5   Further answering Red Hat's Counterclaims, Twin Peaks pleads the following

6   affirmative defenses:

7   **Failure to State a Claim**

8   76.   Red Hat's Counterclaims fail to state a claim upon which relief can be granted.

9   **Waiver, Laches, and/or Equitable Estoppel**

10   77.   Red Hat's Counterclaims are barred, in whole or in part, by the equitable

11   defenses of waiver, laches, and/or equitable estoppel.

12   **Unclean Hands**

13   78.   Red Hat's Counterclaims are barred, in whole or in part, by the equitable

14   defense of unclean hands.

15   **No Copyright Infringement**

16   79.   Twin Peaks has not infringed, does not infringe, and is not liable for

17   infringement of any valid copyright or copyright rights of Red Hat, including, without

18   limitation, any copyright rights in the works that are registered under U.S. Copyright

19   Registration Nos. TX 7-557-456 and TX 7-557-458.

20   **Invalidity**

21   80.   Red Hat's copyright counterclaim is barred due to copyright invalidity to the

22   extent that Red Hat claims rights to works that are functional, are not original, were not

23   authored by Red Hat, or are otherwise not protectable by copyright and/or are not protected by

24   U.S. Copyright Registration Nos. TX 7-557-456 and TX 7-557-458.

25   **Fair Use**

26   81.   Red Hat's copyright counterclaim is barred by the doctrine of fair use.

27   **De Minimis Copying**

28   82.   Red Hat's copyright counterclaim is barred by the doctrine of de minimis

1   copying, as any protectable portions of the works that are purportedly covered by U.S.

2   Copyright Registration Nos. TX 7-557-456 and TX 7-557-458 and used by Twin Peaks (if any)

3   have been de minimis.

Independent Creation

5   83.   Red Hat is not entitled to any relief for its copyright counterclaim because Twin

6   Peaks' "TPS Replication Plus" and "TPS My Mirror" products were created independently and

7   without reference to any works covered by U.S. Copyright Registration Nos. TX 7-557-456 and

8   TX 7-557-458.

License

10   84.   Red Hat's copyright counterclaim is barred because Twin Peaks has either an

11 express or implied license to use the works that are purportedly covered by U.S. Copyright

12 Registration Nos. TX 7-557-456 and TX 7-557-458.

Statute of Limitations

14   85.   Red Hat's request for relief on its copyright counterclaim is limited by the

15 statute of limitations under 17 U.S.C. § 507.

No Injunctive Relief

17   86.   Red Hat has not suffered any irreparable injury, Red Hat has an adequate

18 remedy at law, and injunctive relief would be contrary to the public interest, and Red Hat is not

19 entitled to injunctive relief.

PRAYER FOR RELIEF

21   WHEREFORE, Twin Peaks prays for judgment and seeks relief against Defendants as

22 follows:

23   1.   That all relief requested by Twin Peaks in its First Amended Complaint for

24   Patent Infringement be granted.

25   2.   That all relief requested by Defendants in their Answer and Counterclaims be

26   denied and that Defendants take nothing by way of Counterclaims.

27   3.   That Defendants' Counterclaims be dismissed in their entirety with prejudice.

28   4.   That the Court grant Twin Peaks its costs and reasonable attorney fees incurred

1   in defending against Red Hat's copyright infringement counterclaim under 17

2   U.S.C. § 505.

3   5.   That the Court grant Twin Peaks further relief as the Court deems just and

4   proper.

5   **DEMAND FOR JURY TRIAL**

6   Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Twin Peaks hereby

7   requests a trial by jury of any and all issues so triable that arise out of or relate to Defendants'

8   Counterclaims.

9

    Dated: September 27, 2012   Respectfully submitted,
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11

                                            By: */s/ Richard C. Lin*
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